Frascona Buick, Inc. *and* **Albert Reinholz and Rodney A. Boerst** *and* **Ernest J. Garr.** Cases 30-CA-6666, 30-CA-6666-2, and 30-CA-6974

April 20, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 8, 1982, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Charging Party Reinholz filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Frascona Buick, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Administrative Law Judge's reference, in fn. 17 of his Decision, to p. 250 of the transcript is incorrect; the evidence referred to in that footnote is on pp. 280-281 of the transcript.

[2] Charging Party Reinholz has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] In affirming the Administrative Law Judge's conclusion that Respondent did not act unlawfully in discharging Charging Party Reinholz, Member Jenkins agrees with the Administrative Law Judge's finding that the General Counsel has failed to establish, by a preponderance of the credible evidence, that Respondent had knowledge of concerted activity on Reinholz' part at the time of his discharge. Accordingly, Member Jenkins finds it unnecessary to pass on, and thus he does not rely on, the Administrative Law Judge's alternative analysis of the legality of Reinholz' discharge under *Wright Line*, 251 NLRB 1083 (1980).

In the absence of exceptions thereto, Member Hunter adopts the finding of violations in connection with Respondent's inquiries concerning employee pretrial Board affidavits.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: These consolidated cases were heard in Milwaukee, Wisconsin, on June 14, 15, 16, and 17 and July 6 and 7, 1982, based on unfair labor practice charges filed on August 20, 1981, (Case 30-CA-6666, filed by Albert Reinholz), September 21, 1981 (Case 30-CA-6666-2, filed by Rodney A. Boerst), and February 18, 1982 (Case 30-CA-6974, filed by Ernest J. Garr), and complaints issued by the Regional Director for Region 30 of the National Labor Relations Board, herein called the Board, on October 30, 1981 (Cases 30-CA-6666 and 30-CA-6666-2), and March 25, 1982 (Case 30-CA-6974). The complaints, which were consolidated for hearing, allege that Frascona Buick, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by discharging Reinholz, Boerst, and Garr because they had concertedly complained to Respondent regarding wages, hours, and working conditions and by unlawfully interrogating its employees during pretrial preparation. Respondent's timely filed answer denies the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS—PRELIMINARY CONCLUSION OF LAW

Respondent is a Wisconsin corporation engaged at Milwaukee, Wisconsin, in the retail sale and service of new and used automobiles. Jurisdiction is not in dispute. The complaints allege, and Respondent admits, that Respondent, in the course and conduct of its business operations during the past calendar year, derived gross revenues in excess of $500,000 and purchased and received goods and services valued in excess of $50,000 directly from points located outside the State of Wisconsin. I find and conclude that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent has owned and operated its Buick and Fiat dealership, which consists of sales, mechanical service, and automotive body repair facilities, since approximately 1956. Each year, since at least 1977, Respondent has sustained substantial losses or just broken even. It is undisputed on this record that Respondent's mechanical repair and body shop operations had a poor reputation in

the community; Respondent's president, Anthony Frascona, believed that the service and body shop functions, known in the trade as the back end or back shop, were not carrying their share of the business. Moreover, he believed that the negative reputation of the back end was costing the dealership lost sales.[1] Additionally, during 1980 and 1981, General Motors Buick Motor Division conducted an audit of warranty work performed in Respondent's back shop. It ultimately charged Respondent approximately $32,000 for warranty work performed during repeat visits by customers, which work should have been performed properly or differently with less comebacks. In early 1981[2] Buick advised Respondent that, because of the continued losses, the complaints which had been registered with the Buick Motor Division, and the warranty problems, it should either "make a change or sell the dealership."

In June, Respondent retained a consultant, Lane Sanford, to advise it on steps it might take to improve the efficiency of its service department.[3] Sanford's examination of Respondent's physical plant, the customer records, and the other data corroborated the existence of substantial problems with respect to the efficiency of the service departments. Similarly, Gary McCulloch, Respondent's service manager until mid-August, confirmed that there were serious problems in regard to the quality of work and the reputation of the back end.[4]

Sometime in or about May or June, Frascona was approached by Richard Quinlevan, president of Quinlevan Buick, a rival dealership in Milwaukee which possessed a reputation as having the foremost back shop in that city. Quinlevan Buick's sales, however, were not sufficient to sustain its continued business operations and Richard Quinlevan offered his back shop to Frascona. In or about mid-July, Frascona and Quinlevan executed a series of agreements providing essentially for the assumption of the Quinlevan service departments, including the employees thereof, into the Frascona operations, retention of Quinlevan as a consultant, acquisition by Respondent of Quinlevan's customer lists, and Quinlevan's efforts to direct his former customers to Frascona for sales and service.

Having concluded the agreement with Quinlevan, Frascona left the details of which Quinlevan employees would be brought into the Frascona operations and which Frascona employees would be terminated in the hands of James Basso, his general manager (and nephew), and departed on vacation. Basso observed the Quinlevan employees at work and met with the majority of them in a group meeting. Basso's observations of these employees, together with his review of Quinlevan's service records and customer satisfaction reports, satisfied him that Quinlevan's service departments were superior to Frascona's and that the Quinlevan employees possessed superior work attitudes to those possessed by his own employees. In what Basso characterized, both in his conversations with various individuals before and after July 30 and in his testimony in this proceeding, as a "clean sweep," Basso directed the termination of a substantial number of Respondent's service department employees and the hiring of virtually all the employees from Quinlevan's service departments, including some managers.

As of July 30, Respondent had had 18 employees in its service, body shop, and parts departments, including the departmental managers. Eleven of these, the body shop manager, one bodyman, four technicians (mechanics), including two who specialized in Fiat service,[5] the parts department manager, the parts counterman, the parts helper, the parts driver, and a service writer, were terminated. Included among the terminated employees were Charging Parties Albert Reinholz, a technician, and Rodney Boerst, a bodyman.

Respondent retained seven employees from the affected departments. One was Ernest Garr,[6] one of Respondent's two service writers. Garr had originally been selected for discharge by Basso; he was retained on the specific urgings of McCulloch after he demonstrated particular loyalty or responsibility toward his job by not leaving the facility on receiving his final paycheck as the

[1] These opinions are supported by customer satisfaction reports prepared by Buick based upon surveys of Respondent's customers and those of other dealerships in the same zone.

[2] All dates hereinafter are in 1981 unless and until otherwise specified.

[3] The General Counsel contended that Sanford was an agent of Respondent, possessing supervisory authority over Respondent's managers and employees. Respondent denied that Sanford possessed any such authority and moved to strike all statements by Sanford which were offered to support the General Counsel's theory of violations herein. The evidence establishes the following: In return for a fixed fee, Sanford contracted with Respondent to evaluate the service, body shop, and parts departments in regard to attitude, appearance, and performance. He was ultimately to prepare a handbook for the operation of those departments. Sanford claimed that, while he had no role or responsibility in regard to the tenure of employees, he could effectively recommend the termination of managerial employees. It is unclear whether he believed that he had such authority pursuant to his agreement with Respondent or whether he was talking in more general terms with respect to the weight given his recommendations by any client. Frascona and James Basso, Respondent's general manager and Frascona's nephew, denied that Sanford possessed any such authority and there is little evidence to refute their denial. Respondent's former service manager, Gary McCulloch, testified that, when he was introduced to Sanford, Frascona told him that Sanford "had full authority in the dealership as if it was him or Mr. Basso . . . telling me orders, to cooperate and do as he asks . . . ." Frascona and Basso denied that any such instructions were given. Thereafter, Sanford sat in with Basso while Basso spoke with persons to be hired to replace the existing back shop employees and voiced some opinions on retention or hiring. Basso gave Sanford's recommendations no weight. He followed his own judgment; certain actions he took paralleled what Sanford thought best, others did not. Based on the foregoing, I must conclude that, even if the testimony of McCulloch, described above, is credited, the evidence is insufficient to sustain the General Counsel's burden of proving that Lane Sanford was an agent and/or supervisor of Respondent such that his statements would be binding upon it. Nonetheless, in view of Sanford's close relationship with Respondent, particularly in regard to the back shop operations and the changes made therein, his participation in various meetings and discussions concerning the termination of employees and their replacement by others, and his lack of interest in supporting the General Counsel's case, I must conclude that statements attributed to him are not so inherently unreliable as to warrant their exclusion from this record under the hearsay rule. See *RJR Communications*, 248 NLRB 920 (1980), and cases cited therein. See also *Colony Kitchens*, 217 NLRB 671 (1975). Given Sanford's involvement and participation, as described herein, the statements attributed to him concerning Respondent's motivation, while not controlling, are entitled to consideration.

[4] McCulloch also believed that the situation was improving at the time of the events herein.

[5] One of the Fiat technicians, Wojnoski, had been employed between 2 and 3 months and was about to complete his probationary period.

[6] The Charging Party in Case 30–CA–6974.

other employees did. McCulloch also intervened successfully on behalf of Chester Borkowski, a general and heavy-duty technician. Borkowski had worked for Respondent during the summer of 1980 and had been rehired in April 1981. According to Basso, McCulloch argued for his retention on the basis that he had only recently hired Borkowski after having convinced him to leave his prior employment.[7] Basso testified that Joe Militello was retained because he was a Fiat technician employed on an hourly basis whom the Company had been training for a year and a half to work in that capacity. Basso did not believe that he had anyone coming over from Quinlevan who was qualified to work on Fiats. Additionally, Basso testified that he did not wish to terminate either trainees or hourly paid employees. George Bark, who was retained, was described by Basso as a trainee in the body shop. McCulloch described Bark as an apprentice with 6 to 8 months of experience at Frascona. Mike Hack, who was retained, was an hourly paid employee in the service department, doing lubrications. Daryl Hinz, a body shop employee, was retained, according to Basso, because he had only been hired a day or two before the terminations. Nathaniel Smith, another body shop employee, was retained, Basso testified, because he was an elderly employee whose employment preceded Respondent's ownership of this business. When asked whether Smith was associated with the problems Respondent was experiencing in the back end, Basso testified that Smith "stays to himself. He can't even hear barely. You can barely hear the guy." Basso did not associate him with Respondent's problems.

Immediately following the termination of the 11 Frascona employees, Respondent "transferred" 18 employees from the Quinlevan back end, virtually all of the Quinlevan employees, to its operation. The 18 included 8 technicians, a body shop manager, 3 body shop men, a parts department manager, a parts department driver, a parts counterman, a service writer, and 2 car jockeys. The Quinlevan employees assumed their duties at Frascona with no change in their wages or benefits.

The General Counsel does not contend that the overall termination of Respondent's own employees and their replacement by employees from Quinlevan were discriminatorily motivated. However, it is the General Counsel's contention that Albert Reinholz and Rodney A. Boerst were included with the other nine terminated employees because they had engaged in protected concerted activities. Reinholz was Respondent's most senior mechanic and he and Boerst were the most senior employees terminated on July 31.

B. *Albert Reinholz*

Reinholz had been employed by Respondent for 14 years. He was a general mechanic and had performed heavy-duty mechanical work until 1977 when he sustained a back injury.[8] His work included highly complex and novel mechanical and electrical repair assignments and it is undisputed that he was an excellent mechanic. In addition to being highly skilled, Reinholz was highly productive; he was the most productive employee in the mechanical service department.[9] Reinholz averaged booked time of 60 hours per week while working a 44-hour workweek. His earnings, and those of the dealership, reflected his productivity.

According to Anthony Frascona, Reinholz was never happy during his employment with Respondent. He constantly griped notwithstanding that he made the most money of any of the service technicians, voiced his unhappiness with his job and with Respondent to customers and others, and "bad mouthed" both Frascona and the Company. Frascona also believed that, because of his skills, Reinholz was able, through threats to quit, to force the various service managers under whom he worked to cater to his wishes, to assign him the kinds of jobs he wished to do. Frascona referred to Reinholz' alleged ability to control the service managers as "wagging the service manager's tail" or "the tail wagging the dog." Reinholz was, he claimed, a "prima donna." This he had been told by a number of the managers over the years of Reinholz' employment. McCulloch, the service manager during the last year of Reinholz' employment, testified that Reinholz had created no problems for him; however, he acknowledged that Reinholz had threatened to quit on a number of occasions during protests (discussed in greater detail, *infra*) about wages, about insurance, and particularly about the flat rates for warranty work set by General Motors (an issue over which Respondent had no control). McCulloch had mentioned Reinholz' threats to quit to Stowers, Respondent's office manager. Basso had also heard of these threats. Frascona's general testimony concerning Reinholz' unhappiness and other behavior or characteristics was corroborated, to some extent, by other witnesses. Sanford had spoken to Reinholz as part of his review of the back shop operations. He noted that Reinholz demonstrated a negative attitude, a "deep unhappiness about being at Frascona," and testified that Reinholz had complained to him about the amount of money he (Reinholz) was making. Sanford also noted that Reinholz was able to exert control over his managers because of his value as a technician. One of Respondent's customers, a local police officer who regularly had his cars serviced in Respondent's shop by Reinholz, similarly corroborated Frascona's testimony to the effect that Reinholz voiced his unhappiness with his employer to customers.

[7] Borkowski recalled that, after initially being told that he would be terminated, McCulloch said that he would not be. According to Borkowski, McCulloch claimed to have argued on his behalf that Borkowski caused no trouble, did his work, paid attention to his own business, and did not bother anyone. In light of Borkowski's testimony, which corroborates that of Basso, it would appear that McCulloch was mistaken when he testified that Borkowski was not initially selected for termination and implied that he did not discuss Borkowski's retention with Basso.

[8] While Anthony Frascona denied knowledge of this injury and expressed some concern or complaint about Reinholz' unwillingness to do heavy-duty work since 1977, it is clear and not disputed that Respondent was on notice of Reinholz' injury and the necessity that he refrain from certain heavy-duty aspects of the mechanical work.

[9] Automotive repair work is charged to the customer at an hourly rate on the basis of the preestablished time that a given job is supposed to require, the "book rate." Most mechanics, who receive a percentage or dollar amount based on booked rather than actually worked hours, are able to perform those tasks in substantially less than the book time.

Chet Borkowski was a service technician who worked at the station adjacent to Reinholz'. He testified that there had been occasions when Reinholz would tell the service manager to assign work to Borkowski rather than to Reinholz. However, this was done pursuant to an understanding between Reinholz and Borkowski that, when available, Borkowski would do the engine and transmission work and Reinholz would work on electrical systems and carburetors.

Frascona testified that he was greatly concerned about his employees performing the kinds of work at their homes which they were paid to do in his shop; he testified that such conduct would warrant discharge. He further claimed that it had been common knowledge for many years that Reinholz was doing mechanical work at home.[10]

Notwithstanding all the foregoing, particularly Frascona's opinion of Reinholz as something other than a "loyal employee" and his suspicion that Reinholz was diverting mechanical work from the Frascona shop to his own side business, Reinholz continued to be employed by Respondent for 14 years without warnings, reprimands, or any other form of discipline.

The General Counsel contends that Reinholz' complaints related to wages, hours, and other terms and conditions of employment had been voiced by Reinholz at the behest and on behalf of other employees, and were therefore concerted activities protected under Section 8(a)(1) of the Act. The General Counsel further contends that Reinholz' protected concerted activities engendered the animosity of Respondent's officers, particularly Frascona, which animosity was characterized by Frascona's repeated references to him as "an agitator."

Reinholz testified in general terms to the effect that he had repeatedly complained to the service managers or to Basso about such things as the labor rates, the insurance costs, carbon monoxide fumes, and asbestos dust in the work atmosphere, and similar matters relating to working conditions throughout his 14 years of employment. The other employees, he testified, discussed these complaints with him, he would then discuss them with some member of management, and he would report management's answers back to his fellow employees. His testimony was, to some extent, corroborated by McCulloch who described Reinholz as the spokesman for the service department. McCulloch testified that the men complained to Reinholz about such things as Respondent's increases in the labor rates charged to customers without corresponding increases in the technicians' share of that increase. Reinholz, he said, would bring these complaints to him and he would bring back to Reinholz whatever answer higher management provided. McCulloch based this testimony on his observations of Reinholz gathering with other employees during their lunch hours, after which Reinholz would come to him with complaints which Reinholz would state were on behalf of everyone. Chester Borkowski, who worked alongside Reinholz from July through September 1980 and again from June until the end of July 1981, confirmed that Reinholz made frequent and vocal complaints about the GM warranty rates. However, during these periods he had not observed other employees bringing their complaints to Reinholz. Everyone, he said, spoke for himself.

More specifically, Reinholz testified in regard to particular complaints he had raised. On one occasion many years earlier, during a service meeting, he said, he had asked Frascona about increasing pay and fringe benefits. Frascona politely rejected his request at that time. On the following morning, however, Frascona pointed to him, referred to him as "the hero," an agitator, and a troublemaker, said that Reinholz made enough money and did not have to be a hero for other employees, and suggested that he leave if he did not like it there. When Reinholz asked whether he was being fired, Frascona did not reply.[11] Shortly after this incident, Frascona approached Reinholz and apologized for what he had said. Frascona and Reinholz had a few conversations after that time. Reinholz described no further examples of his bringing complaints directly to Frascona.

However, on another occasion, about 2 years prior to the hearing herein, Frascona, in an apparent jest, made a comment to Reinholz as he was leaving the facility at the start of a vacation. He referred to the agitator in washing machines and told Reinholz not to agitate the employees too much while he was away.

About 3-1/2 years prior to this hearing, Reinholz had complained to his service manager, Tom Rich, about the length of vacations for employees with 10 or more years of service. Following his complaints, the vacations were lengthened. Similarly, his complaints about holiday pay some 2-1/2 years ago resulted in the employees receiving one half a day's pay for Christmas. At some unspecified time, but prior to McCulloch's tenure, Reinholz and Boerst complained to the service manager about the cost of cleaning their uniforms. As a result of this admittedly concerted activity, Respondent undertook to pay the entire cost of cleaning the uniforms.

In June 1980, on the day that McCulloch was hired as service manager, Frascona took him into the office and told him "about his agitators and cliques," naming Reinholz, Boerst, and John Lattski.[12] He further described all three as prima donnas and defined his use of the term "agitator" as meaning that "they wanted to do the jobs only they liked and not what they were given by the service writer or the service manager." Frascona further said, at that time, that he thought "Reinholz was the tail that wagged the dog."

In April there was a change in Respondent's insurance carrier; the cost increased and the benefits were reduced. Reinholz complained to McCulloch and McCulloch allegedly offered to see what he could do. McCulloch testified that, even prior to Reinholz' complaint, he had questioned both Frascona and Stowers, the office man-

[10] Vreeland, the police officer-customer, had heard this from Reinholz but never told Frascona.

[11] Frascona initially testified that he had no recollection of this incident. He then denied making the comments attributed to him by Reinholz. Reinholz' testimony, however, was corroborated by that of Rodney Boerst and, on balance, I find that this corroborated and specific testimony is more credible than Frascona's denials thereof.

[12] Frascona's comments about Boerst will be described in greater detail, *infra*. John Lattski retired in June 1981 and was subsequently rehired after the terminations of Reinholz and Boerst.

ager, about the changes in the insurance program; he did not bring that complaint to their attention or to the attention of anyone else in higher management after Reinholz' complaint to him. He did not tell anyone that Reinholz had voiced such a complaint. Similarly, Reinholz complained to McCulloch in June about the percentage of the labor rate which the mechanics were receiving. McCulloch offered to try to get a higher percentage for Reinholz. Reinholz refused it unless all the mechanics got the same increase.[13] McCulloch brought this complaint to Frascona and Basso but did not mention that the complaint had been initiated by Reinholz. In the same vein, Reinholz and others had complained to McCulloch about the odor of their uniforms when those uniforms were returned from the cleaning service. These complaints, McCulloch testified, were common knowledge and he did not mention them to his superiors. Both Frascona and Basso acknowledged their awareness of Reinholz' repeated threats to quit his employment but both denied knowledge, either direct or through other supervisors, of Reinholz' complaints about wages or other terms and conditions of employment.[14]

Frascona did not deny having referred to Reinholz, from time to time, as an agitator. It was a word, he said, that Reinholz used to describe himself and one which he used in regard to other people, including his spouse. Frascona's use of it, he testified, was meant to connote Reinholz' unhappiness, his griping, and his picking and choosing of those jobs which would be most remunerative. Basso admitted hearing Frascona's references to Reinholz as an "agitator." The last such occurrence, he claimed, was a couple of years earlier, and the context of that usage involved Reinholz' looking for other jobs and threatening to quit.

Basso had met with Richard Quinlevan and the Quinlevan employees around the beginning to middle of the week ending on Friday, July 31. He made the decisions as to which Frascona employees would be terminated or retained during the morning of July 30. The decisions, according to Frascona, Basso, and Sanford, were made by Basso alone; Frascona was on vacation as of July 30 and did not become involved in the specifics of who would be hired and who would be terminated.[15] Basso prepared a list of individuals to be terminated; he denied preparing any list of persons to be kept. McCulloch saw this list, which did not include his own name, and became concerned that his own job was in jeopardy.[16] He contacted Basso, who was at the Quinlevan dealership, by telephone and expressed his concern. Basso assured him of his own job security and suggested that the changes which were going to be made would be pleasing to McCulloch. At this point, according to McCulloch, Basso asked what McCulloch thought of Reinholz. McCulloch praised him highly, stating that Reinholz was "the finest technician I have ever had the pleasure to work with . . . an asset to Frascona Buick . . . a one man team there at times." Basso denied that there was any mention of Reinholz in this telephone conversation and McCulloch's cross-examination description of this conversation contains no reference to Basso asking his opinion of Reinholz.

Basso and McCulloch had a face-to-face meeting later that morning. According to McCulloch, Lane Sanford was also present. At that time, as McCulloch recalled the conversation on direct examination, Basso stated:

> . . . he had made a decision to get rid of Al Reinholz along with the rest of them. He was cleaning house from front to back. He understood that Al was an agitator, that he has always been and still is an agitator. He understood my position that I was over a barrel because good technicians were hard to come by and they were. And Al and his agitation was more or less leading me on. In other words, I think his exact words was "the tail was wagging the dog." . . . I would have good technicians coming in from Quinlevan Buick and I wouldn't have to put up with this any more. And I had choice technicians coming in from Quinlevan that would do the job as good as the people I had.

However, describing this conversation on cross-examination, McCulloch made no reference to Reinholz being called an agitator. He testified that Basso said he had understood that Reinholz had him over a barrel because good technicians were hard to come by, which was why he (McCulloch) had "put up with Al's nonsense," and that he "no longer had to put up with Al and Al's likes with his complainings . . . dictating to me what to do. In other words, the tail wagging the dog. [Basso] was cleaning house from front to back regardless of how good Al was." McCulloch allegedly made one more effort to save Reinholz' job. Basso denied that there was any discussion of Reinholz in this conversation; Sanford was not questioned in regard to it.

[13] As discussed *infra*, Body Shop Manager Roeske had observed Reinholz and Boerst discussing this problem immediately prior to Boerst's complaint thereon to Roeske. He also observed Reinholz go to McCulloch's office when Boerst came to him.

[14] McCulloch terminated his employment with Respondent shortly after, and at least partly as a reaction to, the discharges of July 31. His testimony, as a witness called by the General Counsel, supports and contradicts aspects of both the General Counsel's and Respondent's cases.

[15] Frascona had, of course, negotiated the basic transaction with Quinlevan. Moreover, he had voiced his concern about the alleged deficiencies of both Reinholz and Boerst, particularly Reinholz' repeated threats to quit, his bad mouthing of Respondent, the work both of them were believed to be performing at their homes, and his suspicions that Boerst was unauthorizedly taking company supplies and materials, to Basso on earlier occasions. He denied discussing any of this with Basso within a year of the terminations and further denied that any of these alleged deficiencies were the grounds on which either individual was terminated.

[16] McCulloch testified that he observed a "people to keep" list on Stowers' desk on Thursday, July 30. That list, he said, did not include his name but did include Reinholz'. I must conclude that McCulloch was mistaken. In so concluding, I note that there was never any intention to terminate McCulloch; therefore, it is improbable that any "people to keep" list which did not include his name would have been prepared. Additionally, McCulloch told Reinholz that he had seen Reinholz' name on a list of names on Stowers' desk, which list he "felt . . . were the people that were going to be kept." It seems probable that McCulloch assumed, from seeing the inclusion of so highly regarded a mechanic as Reinholz on that list, that those were the persons to be retained. I believe he drew an erroneous assumption and subsequently remembered his assumption as fact.

In the afternoon of July 30, McCulloch called each of the service department employees who were to be terminated into his office; Reinholz was first. As testified to on direct examination by McCulloch, who admitted that his recollection of the events of July 30 was less than perfect, Reinholz was told that he was being discharged along with the rest of the employees and, when he asked why, McCulloch stated, "I assume it was the same reason I heard all the while I worked for Frascona Buick, that he was an agitator." When questioned about his conversation on cross-examination, McCulloch made no mention of having told Reinholz that his agitation was the reason for his discharge. In that examination, McCulloch ackowledged having told Reinholz that he "assumed the reason he was being fired was because the Quinlevan people were coming in."

McCulloch's conjectural casting of his reference to Reinholz' agitation as the reason for his selection, his reference to Reinholz' agitation when testifying on direct examination, and his omission of references to agitation from his cross-examination testimony, in conjunction with the other differences between his direct and cross-examination testimony, as described herein, require me to find that Basso's testimony, denying any references to Reinholz in either of the July 30 conversations with McCulloch, is the more accurate. If there was any discussion of Reinholz, I am compelled to conclude that Basso, at least, made no reference to him as an agitator.

Reinholz testified that McCulloch told him that he was being discharged "because of [his] agitation." His request that McCulloch put this in writing was rejected. On July 31, at the conclusion of their last day of employment, the employees received letters, signed by Jerome Holmstead, the used car manager, stating merely that they were terminated as of that date.

One of the persons hired from Quinlevan was Otto Kovacs. Kovacs was a service technician, characterized by Ernest Garr as a fine mechanic. Basso testified that he knew that Reinholz could be replaced by Kovacs, whose abilities had been praised by the Buick district manager.

On August 3, Jeff Jackson, a Frascona customer and acquaintance of Reinholz, was at the Frascona facility to have his car serviced. While there, he was approached by Lane Sanford, whom he had previously met. He commented on the new people in the facility and Sanford stated, "Yes, I had to get rid of a few people . . . your friend Al is not with us any longer. One hell of a mechanic, but one problem, his mouth. He is an agitator."[17] Sanford had no recollection of this conversation and neither admitted nor denied it. He acknowledged making similar statements to Reinholz.[18]

Timothy Roeske had been Respondent's body shop manager; he was terminated, along with the other employees, on July 31. On Wednesday, August 5, he returned to the dealership and spoke with Anthony Frascona. According to Roeske, he and Frascona discussed the arrangement with Quinlevan and the elimination of the Frascona employees. Frascona told him that the actions had been taken to better himself. Frascona continued, "And in this way I could get rid of all the agitators." Roeske asserted that there were agitators but they were not doing anything wrong and pointed out that Respondent had terminated its best mechanic, Reinholz. Frascona allegedly acknowledged that Reinholz was a very good mechanic and said, "But he was an agitator also." There was discussion of other employees also being agitators and Boerst's name was mentioned. Frascona stated "that the deal with Quinlevan was an easy way to get rid of all of them . . . all of the agitators and to make more business for him."[19]

C. *Rodney A. Boerst*

Boerst was employed in Respondent's body shop from July 1970 until his termination on July 31, 1981. He was a "combination man," doing body repairs and repainting. As previously noted, he was the most senior of the body shop employees to be terminated.

McCulloch, the service manager since June 1980, testified that Boerst was a "very good employee for the time he was under me." Boerst caused him no problems. He was, McCulloch said, the best employee in the body shop as of July. McCulloch did not claim that there were not better body men in Milwaukee. Similarly, Timothy Roeske, Respondent's body shop manager and Boerst's direct supervisor from June 1980 until both Roeska and Boerst were terminated, described Boerst's work as "good." Both Frascona and Basso, however, described Boerst's work as "hit or miss" or otherwise less than fully satisfactory for a number of years. They also believed that Boerst was diverting work from Respondent's back shop to himself and had been taking equipment, materials, and supplies from Respondent's facility without payment or authorization. Boerst denied doing

[17] The transcript at p. 250, l. 11, reports that this conversation took place on August 31. That reference conflicts with subsequent transcript references and my own memory of the testimony. Accordingly, that transcript reference is herewith corrected to read "August 3, 1981."

[18] Similar statements were attributed to Sanford by John Weiher, an hourly paid service department employee who was not terminated on July 31. He claimed that Sanford had addressed a service department meeting around September and had stated that there had been agitators in the shop, and that "Al was his biggest agitator. And he had gotten rid of Al specifically." Other than to deny using the term "agitator" with respect to Reinholz, Sanford did not deny making the statements attributed to him by Weiher. Weiher's testimony concerning this meeting of service department employees is not corroborated by any other witness notwithstanding that several, including Garr, Kinard, Borkowski, Kovacs, and Schroeder, were called as witnesses by either the General Counsel or Respondent. Borkowski testified that he never heard anyone in management use the term "agitator." Kovacs, who recalled Sanford attending a service meeting conducted by McCulloch, which meeting could have been no more than 3 weeks after the discharges, never heard either Reinholz or Boerst described as an agitator and never heard any reasons assigned for their discharges. Schroeder could not recall Sanford attending any of the service meetings and testified that he never heard Sanford or anyone else call Reinholz or Boerst an agitator. Based on the foregoing, I find this testimony of Weiher lacking in credibility.

[19] Frascona admitted having a conversation with Roeske in the week following the discharges wherein there was discussion about Reinholz. He admitted telling Roeske that Reinholz was not happy nothwithstanding his high earnings and that he had always had a negative attitude concerning Respondent. He denied referring to Reinholz as an agitator, mentioning Boerst at all, or stating that the Quinlevan deal served as an excuse to eliminate the agitators. In light of Frascona's admitted earlier references to Reinholz and Boerst as agitators, his somewhat garrulous nature, and in view of my overall impression of both witnesses, I find that Roeske had the more accurate recollection of this conversation and more credibly described it.

any body work at home other than on automobiles owned by himself, his relatives, and his friends and further denied taking any materials or supplies without permission. Notwithstanding the extended period of time during which Respondent held these beliefs or suspicions about Boerst, Boerst was never reprimanded or otherwise disciplined. He had, however, been confronted with Respondent's suspicions in 1979 and 1980. As with Reinholz, Respondent does not contend that the alleged or perceived deficiencies were the reasons for termination; rather, those beliefs or perceptions merely provided no basis for exempting Boerst (and Reinholz) from the general housecleaning. Unlike Reinholz, the General Counsel does not contend that Boerst's work or productivity was extraordinary.

Boerst testified that, throughout his 11 years in Respondent's employ, he had brought complaints to management concerning working conditions. Thus, he testified that as early as 1970 he had begun pressing for certain modern body shop equipment, equipment which was finally installed in 1978 or 1979. Similarly, from about 1971 through 1976, he repeatedly complained about the number of exhaust fans in the body shop, expressing his complaints directly to Frascona. Ultimately, a second fan was installed. In or about 1978 he and Reinholz complained to the service manager about the percentage of the cost of uniform cleaning being borne by Respondent. Subsequent to their complaint, Respondent began to bear the entire cost. In or about April 1981, Respondent changed health insurance carriers with a resultant decrease in benefits, an increase in paperwork, and no corresponding decrease in premiums. Boerst claimed to have talked to several employees in the body shop and other departments and to both Roeske and McCulloch; he asked McCulloch to set up a meeting between Frascona and the employees. McCulloch reported back to Boerst that Frascona was unavailable for such a meeting. In June, Roeske informed the body shop employees that Respondent wanted their agreement to a reduction in their percentage of the labor rate charged to the customers. Boerst, together with Nathaniel Smith and one other employee, responded to Roeske that they would not agree to such a reduction. Roeske told them that he would talk to Frascona; the commission percentage was not reduced. In that same month, according to Boerst, Boerst complained that the uniforms, as they were coming back from the cleaning service, were causing him to break out in a rash. Boerst did not know whether Frascona had any particular knowledge of his involvement in pressing for the new body shop equipment or for Respondent to bear full cost of the cleaning of uniforms. Neither did he have any direct knowledge that McCulloch had talked to Frascona or Basso about his complaints concerning the change in health insurance carriers.

After describing Reinholz' role as the alleged spokesman in the service department, McCulloch testified that Boerst was "more or less the spokesman for the body shop." Boerst, he said, would ask him about new pay plans affecting all the body shop employees; McCulloch would secure explanations and report those explanations back to Boerst. There is no evidence that, in doing so, McCulloch would report that the source of the complaint or question was Boerst. McCulloch described the complaints in regard to the health insurance and the labor rate as coming from Reinholz; he did not mention any involvement by Boerst. Boerst, McCulloch said, normally took his complaints to the body shop manager, Roeske, who would relate them to McCulloch. There were not as many complaints coming from the body shop as from the service department and he testified that Boerst did not make as many complaints as did Reinholz. The only complaints which he could specifically recall as coming from Boerst related to the odor of the uniforms and possibly a complaint concerning the body shop exhaust fans. In his investigatory affidavit, McCulloch had stated that he had not observed Boerst acting as a spokesman as he had observed Reinholz act. No employees ever told McCulloch that Boerst (or Reinholz) was speaking for them.

Roeske corroborated Boerst's testimony concerning certain complaints. In or about June, Roeske observed Boerst talking with Reinholz about the reduction of the percentage of the labor rate received by the body shop employees. Boerst complained to him about that reduction. Roeske told Boerst that there was nothing he (Roeske) could do about it, that it was an office decision and Boerst could speak to McCulloch if he desired to do so. He subsequently observed Boerst enter McCulloch's office. When Boerst approached Roeske, Roeske observed Reinholz go into McCulloch's office. In this same conversation, Boerst questioned Roeske about the elimination of profit sharing and Christmas bonuses. Roeske presented Boerst's complaints to McCulloch. Roeske also testified that Boerst had asked him to purchase certain equipment for the body shop and that he had done so. Boerst, he said, was the only one in the body shop who brought complaints to him.

Frascona and Basso both denied that they were told of Boerst's complaints concerning the health insurance or wages. Frascona testified that Boerst had never complained directly or indirectly to him and he was never told by either the service or body shop manager that Boerst was complaining. He denied that Boerst complained to him about the air purification system and testified the requests for new body shop machinery were presented to him by the bookkeeper with no mention of Boerst as the source of such requests.

Boerst testified that every shop manager under whom he had worked had told him that Frascona had referred to him as an agitator. Most recently, this had been reported to him by Roeske about a month after Roeske was hired (in June 1980). Similarly, at or about the same time, McCulloch had called Boerst into the office to tell him, "Mr. Frascona told him to fire me if I kept up being an agitator and troublemaker in the body shop." Notwithstanding Boerst's query, McCulloch did not define the ways in which he was considered an agitator or troublemaker. Both McCulloch and Roeske essentially corroborated Boerst's testimony. Thus, McCulloch testified that on his first day of employment, in June 1980, Frascona told him "about his agitators and his cliques." Specifically named were Reinholz, Lattski, and Boerst

who were referred to as prima donnas. Frascona said they only did the work they wanted and not what they were assigned by the service managers and service writers. McCulloch was directed to straighten them out and let them know that he was running the shop, not they. Frascona described Boerst to McCulloch as "a real bad apple in the back in the body shop." McCulloch called Boerst into his office and repeated the essence of Frascona's admonitions: McCulloch was the boss and Boerst would be following his orders.

Roeske similarly testified that, on several occasions, Frascona told him to watch out for Boerst, that Boerst was an agitator.[20]

On July 30, Boerst and the body shop manager, Roeske, were called into McCulloch's office and told they were terminated. McCulloch, who voiced some concern for his own job security, said that it had been a dealer decision and he did not know why. He told Boerst that he did not know whether there was any connection between the Quinlevan deal and the terminations.

According to Frascona, Basso, and Sanford, and as previously noted, the decision as to which Frascona employees would be terminated was made solely by Basso; Frascona neither participated in that decision nor was he informed of the details until after the fact. Basso had made his decisions on the morning of July 30. He claimed that he was making basically a "clean sweep" of the service departments, retaining only a few (as discussed *supra*), and that is what he told various people at the time he made his decision. Basso denied that Boerst's conduct or attitude, or any of the misconduct in which Respondent suspected him of engaging, played any role in his decision. He acknowledged, however, that, having decided to make a clean sweep, he saw no basis to exclude Boerst from it because of his attitude and those suspicions.

As previously noted, Frascona, on his return to Milwaukee, told Roeske that the Quinlevan deal had been undertaken to improve Respondent's operation and "that the deal with Quinlevan was an easy way to get rid of all of . . . the agitators." He named Boerst as well as Reinholz among the agitators.

D. *Ernest J. Garr*

Garr was employed by Respondent since late 1979 as a service writer, the individual who writes the repair tickets when customers bring their vehicles in for service. He was one of the individuals whom Basso had determined to terminate on July 31, 1981; as previously noted, his job was saved at that time through the intercession of McCulloch. For a period of about 7 weeks, following McCulloch's voluntary termination, Garr was Respondent's service manager. He was replaced in that capacity by Brano Treskon and returned at that time to the service writer classification.

McCulloch described Garr as an excellent employee throughout McCulloch's tenure. There is some evidence indicating that he resented being replaced as service manager by Treskon and after being so replaced "bad mouthed" Treskon to customers and other employees. Respondent does not contend that Garr was terminated because of his attitude toward Treskon or for any other misconduct aside from that allegedly occurring on February 8, 1982.

Prior to February 1982[21] Respondent's service writers were paid a commission consisting of 6 percent of the entire service orders which they wrote, including labor, parts, and warranty work. They received a minimum of $275 per week as a draw against that commission with the balance of their earned commission being paid at the end of each month. For a period of some months prior to February, Garr and Richard Kinard, Respondent's other service writer, had by agreement between them pooled and split their commissions. Early in February, Treskon called both Garr and Kinard into his office and directed that there would be no further commission splitting. Garr and Kinard discussed the issue and returned to Treskon. Both tried to convince Treskon to let them continue splitting commissions in the interest of better service. Treskon refused.

On the morning of February 8, Treskon called Garr and Kinard into his office and told them that they would be working under a new pay plan effective immediately. The new plan, as Garr and Kinard understood it, reduced their guaranteed earnings, or draw against commission, from $275 to $125 per week ($1,100 per month as against $500 per month), reduced the commission on labor charges from 6 to 5 percent, and eliminated the commission on parts.[22]

Subsequent to this meeting with Treskon, Garr and Kinard discussed their pay change with each other and concluded that they would each be losing about $600 per month. Their conversation was overheard by at least one employee, Borkowski, who observed that they appeared to be upset. Kinard also spoke to at least one other employee, Kovac, about the effect of the new pay plan on him and Kinard heard Garr discussing the same subject with another mechanic at the service desk. Garr and Kinard spoke with Treskon a second time on that morning and continued to object to what they deemed to be a $600-per-month reduction in their pay.

While Respondent had no written rules providing a dress code for its employees, Treskon had made it clear to Garr and Kinard that he expected them to wear neckties while at work. Sometime during the morning of February 8, Garr took off his tie, opened his shirt collar, and wore his shirt with the collar outside his jacket (in the fashion of a sports shirt). He removed his tie, he testified, because he had gotten oil on it while examining a customer's car. In his statement supporting his claim for unemployment compensation, he had denied that he had removed his necktie as a protest or as a sign of "unprofes-

[20] In light of the mutually corroborative and specific testimony given by Boerst, McCulloch, and Roeske, I cannot credit Frascona's denials that he had spoken to McCulloch or Roeske about his view of Reinholz and Boerst as agitators.

[21] All dates hereinafter are 1982 unless otherwise specified.

[22] Trekon subsequently explained to Kinard, after Garr's discharge, that the new plan provided for a *salary* of $500 per month rather than a draw against commission. I am satisfied that Treskon's less-than-complete fluency in the English language, which is not his mother tongue, and the abrupt manner in which he presented the new plan contributed to an understandable confusion in the minds of both Garr and Kinard and to their resultant anger.

sionalism." Rather, he had stated, he *probably* had gotten oil on it. Kinard similarly removed his necktie at or about lunchtime and was not wearing a tie when he returned from lunch. Kinard took his tie off because he was upset and indifferent to the possibility of discharge. He surmised that Garr's action was similarly motivated.

Sometime during that morning, Treskon observed Garr and Kinard with their ties off, laughing. He also heard Garr state, in response to the ringing of the telephone, "Let Brano take it. He didn't get a cut in pay."[23] Treskon did not respond directly to either their laughter, their open collars, or this remark by Garr. However, he asked Basso to walk through the service area to see how the service writers were taking the new pay plan. Basso did so. Basso testified that he observed Garr standing in front of the service desk, leaning over it, "shaking his ass." He said nothing to Garr; rather, he told Treskon what he had observed. Garr denied leaning over the counter and "shaking his ass." While it is clear from this record that Garr was upset at this juncture, sufficiently upset that his state of mind was noticed by several other employees, the aforedescribed gesture is so ambiguous and so much the possible result of a misinterpretation by Basso of an otherwise innocent and unremembered (by Garr) gesture that I cannot, and believe need not, resolve this "momentous" dispute.

Treskon called Garr into his office. The content of this conversation is critical. According to Treskon, Garr was asked, "What was going on?" When Garr asked what Treskon was referring to, Treskon stated, "Well you have your tie off, you are very unprofessional out there in front of customers, all of the technicians, parts people, especially customers. This is why I was very upset." Treskon asked Garr what he felt they should do about it and Garr replied, "Well, I guess that is it. Am I laid off? What are you going to do? . . . Are you laying me off or firing me?" Treskon, feeling that he had been backed into a corner by Garr, told Garr that he was laid off.

Testifying in this proceeding, Garr claimed that Treskon had asked him, "What is going on? Why are you talking to the mechanics?" Garr claimed that Treskon accused him of trying to create problems with the mechanics, instigating things with them and with Kinard and being an agitator. Treskon further allegedly accused Garr of not doing a satisfactory job and told him that he was being laid off. When he left Treskon's office, Garr told Kinard and Borkowski that Treskon had accused him of being an agitator and causing trouble among the mechanics and had terminated him. However, when Garr had testified in support of his unemployment compensation claim, on March 31, he described the conversation which ended in his termination in terms substantially similar to those used by Treskon. He claimed herein that he did not mention Treskon's accusations that he was an agitator or instigator either in that unemployment compensation testimony or in his March 5 statement to the unemployment compensation investigator because his attorney had advised him not to.

While the matter is not free from doubt, particularly in light of his *res gestae* type statements to Kinard and Borkowski, I must conclude that the conflict between Garr's statements in support of his unemployment compensation claim and his testimony herein renders his testimony herein less credible that the candidly offered testimony of Brano Treskon. See *Hansen Chevrolet*, 237 NLRB 584, 589 (1978). His explanation of that conflict, even if true, demonstrates a willingness to "shade" sworn testimony where doing so might be to his economic advantage. Accordingly, I find that Treskon's description of that final meeting more credibly relects what actually took place than does Garr's.

E. *Requests for and About Affidavits*

In preparation for the hearing in these consolidated cases, Respondent's counsel questioned a number of employees. Among those questioned were Richard Kinard and Chester Borkowski. Kinard was called into Frascona's office for his first interview in or about late April. Frascona, Treskon, and the attorney, Patrick W. Schmidt, were all present. Frascona introduced Schmidt as his attorney, stated that Schmidt wanted to ask him some questions about Ernest Garr, and urged Kinard to tell the truth. Frascona and Treskon then left the room while the questioning was conducted.

A composite of Kinard's testimony on direct and cross-examination establishes the following:[24] In that first meeting, I find, Schmidt informed Kinard that he was Frascona's lawyer with respect to the Garr unfair labor practice proceeding, and told Kinard that he did not have to answer questions if he did not want to and that there would be no reprisals if he declined to answer. He then questioned Kinard concerning the events surrounding Garr's discharge. Schmidt interviewed Kinard for a second time in late April or early May. At this time, it appears, Kinard mentioned that he had given an affidavit to an agent of the National Labor Relations Board. Schmidt told Kinard that he would like to have a copy of it. According to Kinard, Schmidt said "that I did not have to give it to him if I didn't want to. It was left up to me, whatever I wanted to do. And I told him I would have a copy mailed to him." Kinard subsequently did so. Schmidt met with Kinard for a third time on June 8. Again, Kinard was informed of the purpose of their meeting, was assured that his participation was voluntary, and was further assured that he could stay or leave without reprisal. In Kinard's affidavit, he had stated that Garr, upon coming out of Treskon's office at the time of his discharge, had stated that Treskon had

[23] Treskon's testimony in regard to this statement is corroborated by Kinard and another employee, Schroeder. I credit their recollections over Garr's claim that he merely said, "Let [the phone] ring. Maybe Mr. Treskon will take it."

[24] On direct examination, Kinard did not recall Schmidt explaining the purpose of his questions at their first meeting. On cross-examination he recalled that Schmidt had said something about Garr, possibly that he was Respondent's lawyer in connection with Garr's unfair labor practice proceeding. He then acknowledged that he was told essentially the same thing in his second conference with Schmidt as he had been told during the first conference. Schmidt's statement prefacing their second meeting included a statement of the purpose of their meeting as well as assurances that he could answer or not free from reprisal. Kinard could not recall whether, in their third meeting, Schmidt repeated the required assurances. However, Daniel Gourash, Schmidt's law clerk, was present. He testified that Schmidt so assured Kinard in that meeting.

called him an agitator. In this meeting, Schmidt asked Kinard about that statement. He asked whether "[Treskon] actually 'called him an agitator' or said he was an agitator."

In mid-May, Borkowski was summoned to the conference room where Schmidt, after giving him the necessary assurances, began to question him concerning the circumstances surrounding Garr's discharge. In the course of Schmidt's questioning, Borkowski indicated that he was not sure about a specific word that may have been used by Garr in describing the Garr-Treskon exchange and did not want to commit himself. When asked whether there was any way he could remember that word, Borkowski stated that he could look at the affidavit he gave to an agent of the Board. Schmidt gave Borkowski his business card with his home telephone number written on it and asked Borkowski to call him at home if he found the affidavit. Borkowski could not recall Schmidt's exact question; he did not recall Schmidt asking that he call to tell him the word as contained in that affidavit. He thought that Schmidt wanted to see the affidavit.[25] Borkowski neither called Schmidt nor furnished him with a copy of his investigatory affidavit.

F. *Analysis*

1. The discharges of Reinholz and Boerst

The General Counsel does not question the legitimacy of the arrangement between Respondent and Quinlevan Buick which resulted in the replacement of the majority of Respondent's back end employees by individuals formerly employed by Quinlevan. Rather, the General Counsel contends that the Quinlevan deal provided a pretext by which Respondent was able to terminate two employees, who would not have otherwise been terminated, because those employees had engaged in concerted activities protected under Section 8(a)(1) of the Act. Respondent, citing those circuit court cases which place a much more limited interpretation upon protected concerted activity than does the Board,[26] argues that Reinholz and Boerst engaged in no significant protected concerted activities, that if they did it was outside the knowledge of the agent who made the decision to discharge them, and that they would have been discharged whether or not they had engaged in known protected concerted activities.

It is not necessary to descend into the morass resulting from the differing views of protected concerted activity of the Board and various courts. Under any test, on various occasions Reinholz and Boerst had engaged in such activity. The complaints they presented, dealing with wages, insurance, holidays, vacations, uniforms, and similar matters, were of common interest to, and would benefit, all the employees.[27] Moreover, the credible evidence establishes that at least some of those complaints resulted from group discussions and action. Reinholz' testimony, that his discussion of complaints with the service managers followed group discussions with other service technicians, is unrefuted[28] and is corroborated by McCulloch's observations and characterization of Reinholz as the departmental "spokesman."[29] Similarly, while there is evidence that Boerst was not so much the "spokesman" as was Reinholz, it is undisputed that his complaints similarly followed discussions with other employees. In fact, on several occasions, his discussions were with Reinholz. In one, as recently as June, their discussion was observed by Roeske, the body shop manager. In another, at or about the same time, Boerst and two other employees spoke jointly with Roeske, rejecting a reduction in the percentage of the labor rate they would receive. Complaints about wages and working conditions which are the result of group action are protected concerted activity of the clearest kind. See, for example, *Pelton Casteel, supra*, and *ARO, supra.*

It is not enough, in order to establish that discharges were unlawful, merely to show that the employees were engaged in protected concerted activities. As the Board stated in *Diagnostic Center Hospital Corp.*, 228 NLRB 1215, 1216 (1977):

> In order to sustain an 8(a)(1) discharge finding, it is necessary to establish that at the time of the discharge the employer had knowledge of the concerted nature of the activity for which the employee was discharged.

Clearly, the concerted nature of Reinholz' and Boerst's protected activities was known to McCulloch and Roeske. However, the decision as to which employees would be terminated and which retained was made by Basso. McCulloch's input (even if his testimony in this regard were to be credited) was limited to a recommendation, not followed, that Reinholz be retained; Roeske had no input and was one of those who were terminated. McCulloch and Roeske both testified as the General Counsel's witnesses, both appeared to be at least sympathetic toward the claims of the alleged discriminatees,

[25] The foregoing is drawn from Borkowski's cross-examination testimony. On direct-examination, Borkowski testified that Schmidt had indicated his awareness that Borkowski had given an affidavit and asked to see it. In both his direct and cross-examination testimony, Borkowski stated that Schmidt gave him a business card with the home telephone number written thereon and had asked him to call that very evening in the event that he found his affidavit. Such a request, I must conclude, is probable only in connection with a request that the witness examine that affidavit to determine how a particular statement was phrased. Had Schmidt been asking to see the affidavit, it is unlikely that he would have asked Borkowski to call him, particularly at home.

[26] See, for example, *Pelton Casteel v. NLRB*, 627 F.2d 23 (7th Cir. 1980), denying enforcement to *Pelton Casteel*, 246 NLRB 310 (1979), and *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979), denying enforcement to *ARO, Inc.*, 227 NLRB 243 (1976).

[27] I reject Respondent's suggested inference that, inasmuch as Reinholz was reputed to seek preferential treatment for himself in the assignment of work, his wage and benefit complaints were similarly intended only for his own benefit. His rejection of McCulloch's offer to seek a wage increase for himself alone refutes such a contention.

[28] The testimony of Borkowski, a short-time employee, to the effect that he did not observe such discussions does not establish that they did not occur.

[29] McCulloch did not, contrary to Respondent's assertion on brief, testify that he used the term "spokesman" because he knew that it was "necessary for Reinholz to prevail in this proceeding." When asked, on cross-examination, whether that was his reason for so describing Reinholz, he answered, in a clearly facetious manner, "If my eighth grade education got it that far, yes." The plain import of such testimony is to deny, not admit.

and both denied having told Basso (or Frascona) that complaints about wages and working conditions originated with Reinholz or Boerst. In such circumstances, it would be inappropriate to impute the knowledge of McCulloch and Roeske to Basso. See *Kimball Tire Co.*, 240 NLRB 343, 344 (1979) (Member Jenkins dissenting on other grounds), where the Board stated:

> It is true that information acquired by a supervisor, with respect to the specific employees involved in the union campaign, is ordinarily imputable to the employer. This is a natural effect of the loyalty which a supervisor, by virtue of his position, feels toward his superiors. Nevertheless, the inference cannot be drawn in the instant case, as Walter Akin [the supervisor and son of one of the alleged discriminatees] did not initiate the action [i.e., higher management's interrogation of him] and his credited testimony indicates that he did not communicate his knowledge of union activity to higher management.

The General Counsel argues, essentially, that Frascona's repeated references to Reinholz and Boerst as agitators establish both the necessary knowledge of their protected concerted activities and Respondent's antipathy toward employees who would so engage. I agree that Frascona's use of that term warrants grave suspicion: "agitator," when used in a labor relations setting, normally carries such connotations. Here, while Frascona admitted that his use of the word referred, in part, to the employees' griping, it is clear that it also carried other meanings of importance to him. Thus, he testified that it referred to the employees' unhappiness and, in particular, to the ability of certain employees to control their own work assignments, to force their managers to cater to them. His testimony is supported by other record evidence. Specifically, McCulloch testified that, when, on his first day of employment, Frascona told him of "his agitators and cliques," he also referred to them as "prima donnas" and defined his use of the word agitator to mean that they picked and chose their jobs and controlled, rather than were controlled by, their managers. There were repeated references to Frascona's belief that these employees were considered to be agitators because they were the "tail wagging the dog"; i.e., the employees directing, rather than taking direction from, their supervisors. I note, too, that Frascona had been referring to some of his employees, particularly Reinholz and Boerst, as agitators for many years without ever taking action against them. And the record does not contain any evidence that they were referred to as agitators during the year preceding their terminations. Basso testified that he had not heard Frascona so describe them for a couple of years before he made his selections. These factors all tend to negate inferences of knowledge and animus. Thus, I must conclude that the General Counsel has failed to prove, by a preponderance of the credible evidence, a critical element in establishing the alleged violations, knowledge.

However, even if I were to impute knowledge from McCulloch and Roeske to Basso, or infer it from Frascona's references to Reinholz and Boerst as agitators, I would not find that they had been discharged in violation of Section 8(a)(1). In light of the unquestioned validity of Respondent's overall action in replacing its back end employees with those from Quinlevan, this case presents, at best, a question of dual motivation. The mode of analysis for such cases is as set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).[30] Pursuant to the *Wright Line* mode of analysis:

> . . . it is incumbent on the General Counsel to adduce evidence supporting his contention that an employee was unlawfully discharged. Should a *prima facie* case of unlawful discharge be shown, the burden of persuasion shifts to the respondent to establish a lawful reason for the discharge. [*Hillside Bus Corp.*, 262 NLRB 1254 (1982) (Member Jenkins dissenting on other grounds.]

When the burden of persuasion shifts, the respondent may rebut the "*prima facie* showing with evidence indicating that the same action would have been taken even in the absence of the employee's protected activities." The General Counsel must then carry his ultimate burden of establishing that the discharge was, in fact, unlawfully motivated. *Sioux Products, supra* at 1257; *Wright Line, supra.*

Viewing the General Counsel's case in isolation, it is at least arguable, in light of the protected concerted activities and the references to the alleged discriminatees as agitators, that a *prima facie* case has been established. Turning therefore to Respondent's defense, I must conclude that its burden of demonstrating "that the same action would have taken place even in the absence of the protected conduct" has also been met. Respondent's business was in trouble; it had been for some time. Its problems stemmed, Respondent believed with some justification, from the poor reputation suffered by its back end. No specific employees were pinpointed as being responsible for the failings of the back end. Respondent was presented with an opportunity to replace its back end with that of another dealership which enjoyed an excellent reputation for service and it grabbed that opportunity. Basso, the general manager who made all the subject decisions, determined, in his own words, to "make a clean sweep," to "clean house from front to back."[31] Basso did not terminate all of Respondent's back end employees but his justifications for keeping those who were retained were neither so unreasonable or implausible as to be unworthy of credence.[32] No one was retained on

[30] The Seventh Circuit has expressed its approval of the *Wright Line* standard. See *Sioux Products v. NLRB*, 684 F.2d 1251 (1982). See also *Peavey Co. v. NLRB*, 648 F.2d 460 (1981). The *Wright Line* analysis is applicable to 8(a)(1) discharge allegations. See *Castle Instant Maintenance/Maid*, 256 NLRB 130 (1981).

[31] Basso's use of these expressions in conversations with various individuals, immediately before and after the actions were taken as well as in this hearing, essentially negates the General Counsel's contention that the statements of position submitted by Respondent's counsel during the investigation, which refer to Respondent as selecting the most qualified employees for retention, evidence shifting reasons for the selections. Basso, who made the decisions, has maintained a consistent position throughout.

[32] The General Counsel, seeking to overcome Respondent's defense without referring to *Wright Line*, argues that Respondent retained "loyal" employee Garr and two employees who "stayed to themselves" and

Continued

the basis of his productivity or exceptional skills and Respondent was able to acquire new employees with skills at least equal to those possessed by Reinholz and Boerst. Therefore, while it would not have been surprising for Respondent to have kept someone of Reinholz' skill and high productivity, it cannot be said that Reinholz was treated disparately from any of the other service technicians. Even less of an argument can be made for Boerst, who may have been the best body man Respondent had at that time, but for whom no claim can be made of exceptional skill warranting an exception from the general "housecleaning." Finally, I note that there is no probative evidence indicating that Respondent ever considered retaining Reinholz and Boerst when it eliminated the nine others or that it changed its mind and determined to include them because of their protected concerted activities.[33]

Accordingly, for all of the reasons set forth above, I conclude that the General Counsel has failed to sustain his burden of proving that Respondent discharged Reinholz and Boerst for having engaged in protected concerted activities; I shall recommend that those allegations be dismissed.

2. The discharge of Garr

Applying the same *Wright Line* mode of analysis to the discharge of Ernest Garr, I must similarly conclude that the General Counsel has failed to sustain his burden of proof on this allegation.[34] Garr was, I am satisfied, engaged in protected concerted activities when he and Kinard discussed Treskon's prohibition of commission splitting and when they sought to change Treskon's mind on that subject. They were similarly engaged when they discussed the new pay plan among themselves and with other employees and when they complained to Treskon about the effect of that plan on their earnings.[35]

Notwithstanding that I have found Garr to have been engaged in protected concerted activity on and before the morning of February 8, I cannot find that he was discharged because of that activity or that he would not have been discharged even in the absence of such activity. The testimony which I am compelled to credit concerning the final exchange between Garr and Treskon contains no reference to Garr's protected concerted activities. Treskon's concern, it appears, was solely with what he perceived to be Garr's unprofessional behavior.[36] It further appears that Garr's attitude in that meeting forced Treskon's hand and brought about the termination. Discharge under such circumstances, while perhaps harsh, is not so patently unreasonable as to require a conclusion of unlawful motivation.

According, I shall recommend that this allegation be dismissed.

3. The requests for affidavits

The credited evidence establishes that attorney Schmidt, in the course of pretrial preparation for this litigation, gave each of the questioned employees the assurances required by the Board as set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964).[37] However, in questioning those employees, he asked at least one for a copy of the affidavit given to an NLRB investigator and also asked two employees about the contents of such affidavits. Such conduct, the Board has consistently held, violates Section 8(a)(1). Thus, in *Johnnie's Poultry*, at 775–776, it was stated:

> In defining the area of permissible inquiry, the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent. For such questions have a pronounced inhibitory effect upon the exercise by employees of their Section 7 rights, which includes protection in seeking vindication of those rights free from interference, restraint, and coercion by their employer. Moreover, interrogation concerning employee activities directed toward enforcement of Section 7 rights also interferes with the Board's processes in carrying out the statutory mandate to protect such rights. We note, in this

"caused no problems," Smith and Borkowski. Retention of some employees for these as well as other expressed reasons (including Smith's exceedingly long tenure and Borkowski's recent hire after having been induced to leave other employment) does not establish that Reinholz and Boerst were selected because their protected concerted activities "caused . . . problems." I note that Respondent's reference to Garr's loyalty had nothing to do with protected concerted activity. Rather, it referred to his continued service to customers even after he was given his final pay.

[33] In so concluding, I have given little weight to Respondent's description of their alleged deficiencies, particularly the claim that they worked out of their homes and the claimed suspicion that Boerst took company supplies and materials for his own use. Respondent had too long tolerated their alleged deficiencies to place much weight on them at this time. Neither have I given much weight to the testimony of Roeske and Jackson concerning post-termination references to Reinholz and Boerst as agitators by Frascona and Sanford. Frascona, as noted, was not involved in the selection process; moreover, he used the term agitator loosely and with varied meanings. Sanford, I believe, just liked to talk and his claim to Jackson that he fired Reinholz is totally without substance. His statement, while based on things he probably heard from Frascona, is insufficient to establish Basso's motivation as unlawful.

[34] The result would be the same whether the facts were viewed from a "pretextual discharge" or "dual motivation" perspective.

[35] To the extent that conversations between employees must "be talk looking toward group action" in order to be protected, the concerted urgings of Garr and Kinard that Treskon reverse himself on both these matters, following their discussions, establishes the requisite group action. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Charles H. McCauley Associates*, 248 NLRB 346 (1980), enfd. in relevant part 657 F.2d 685 (5th Cir. 1981). Moreover, even assuming that Garr and Kinard were in error concerning the effect of the new pay plan upon them, their joint discussions and protest remain protected. As the Board has often stated, "it is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith." *Wagner-Smith Co.*, 262 NLRB 999, fn. 2 (1982), and cases cited therein. Treskon's manner and timing in presenting substantive changes in pay plans to the employees, making adverse reactions predictable, negates any question of bad faith.

[36] Treskon's question, "What was going on?" could be considered a reference to Garr's conversations with Kinard and other employees. Equally reasonable, perhaps even more likely, is that it referred to the attitude he openly displayed or appeared to display by his actions and comments.

[37] Pursuant to that rule, consistently adhered to since its promulgation, an employer's pretrial questioning of an employee must be for a valid purpose, that purpose must be communicated to the employee, the employee must participate voluntarily, and that employee must be assured that he may answer or not free from any reprisals. Additionally, the questioning must not exceed the necessities of the situation and must occur in a context free of employer hostility to the exercise of statutory rights.

connection, that under the safeguards attending a hearing on unfair labor practices, counsel for Respondent parties are entitled to the availability, upon request, of the affidavits of General Counsel witnesses for use in cross-examining those witnesses.

It is evident from the foregoing that by its inquiries relating to statements given the Board agent, the Respondent interfered with the statutory rights of its employees in violation of Section 8(a)(1) of the Act.

This principle applies to requests for, as well as questions about, NLRB affidavits. *Ingram Farms*, 258 NLRB 1051 (1981); *Anserphone, Inc.*, 236 NLRB 931 (1978). Moreover, the request for such affidavits is violative even if preceded by assurances that production is completely voluntary. *GEX of Colorado*, 250 NLRB 593 (1980).

In arguing against application of the Board's *per se* rule affecting requests for affidavits, Respondent cites *Robertshaw Controls Co. v. NLRB*, 483 F.2d 762 (4th Cir. 1973) (denying enforcement in relevant part to the Board's Order, 196 NLRB 449 (1972)), and *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976) (denying enforcement in relevant part to the Board's Order, 215 NLRB 340 (1974)). In both of those cases, the courts held otherwise noncoercive requests for employees to voluntarily furnish copies of their affidavits to their employer not to violate Section 8(a)(1).

As Respondent expressly recognized, the Administrative Law Judge is obligated to follow Board law until changed or until reversed by the Supreme Court. *Charles H. McCauley Associates, supra* at 349. Board law, as expressed in *Johnnie's Poultry, Ingram Farms, GEX*, and *Anserphone*, is clear (and there appears to be no contrary authority in either the Seventh or the D.C. Circuits, where review or enforcement of this proceeding might be sought). Accordingly, I find that by requesting copies of affidavits employees had given to the NLRB, and by questioning employees concerning the contents of those affidavits, Respondent has violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. By requesting that employees furnish its counsel with copies of affidavits given to agents of the National Labor Relations Board, and by questioning employees concerning the contents of those affidavits, Respondent has violated Section 8(a)(1) of the Act.
2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. Respondent has not engaged in any unfair labor practices other than those described above.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[38]

The Respondent, Frascona Buick, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Asking employees for copies of affidavits given to agents of the National Labor Relations Board or questioning employees about the contents of such affidavits.

(b) In any like or related manner interfering with employees in the exercise of rights under the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its Milwaukee, Wisconsin, facility copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the consolidated complaints be dismissed insofar as they allege violations of the Act not specifically found herein.

[38] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[39] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT ask our employees for copies of affidavits given to NLRB agents or question them concerning the contents of such affidavits.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

FRASCONA BUICK, INC.